

The Environmental Protection Bureau (Bureau) performs two central functions: enforcing environmental laws through civil and criminal court actions and providing legal counsel and representation to the agencies responsible for the protection, control and preservation of the State's environment. Increasingly, the Bureau has taken a lead role in multi-state litigation initiatives aimed at protecting the State's air and water from threats that largely originate outside New Hampshire. Most notably, the Bureau filed the first and only state-initiated lawsuit against the manufacturers of MTBE, a gasoline additive that has contaminated surface and ground waters throughout the State, including public and private water supplies. Finally, the Bureau is involved in transactional matters, such as Brownfields redevelopment and bankruptcy proceedings, where its focus is typically to harmonize environmental cleanup and compliance with economic development of old and present industrial sites.

MTBE Litigation

The Bureau filed the first and only statewide lawsuit by an Attorney General to recover damages from oil companies that added methyl tertiary butyl ether (MTBE) to gasoline, causing widespread contamination of the State's waters with a chemical that is costly to find and remove. The State's suit alleges that MTBE has been associated with adverse health consequences and can render water unpalatable, even at very low levels. Because MTBE dissolves easily in water, it travels faster and farther than other gasoline constituents and is more difficult to find and remove, making cleanup more expensive. Although the State has been at

the forefront of adopting strict gasoline storage regulations, the suit alleges, MTBE is still escaping into the environment. Contamination often is not traceable to a particular source or spill and may not even be associated with underground leaks at gas stations.

The lawsuit claims that MTBE's makers and refiners, including ExxonMobil Corporation and Lyondell Chemical Company, have added increasing amounts of MTBE to gasoline even though they knew years ago that it would contaminate water supplies, thus producing a defective product, creating a public nuisance, and violating environmental and consumer protection laws. The State requested all costs associated with addressing the problem and restoring State waters to their original condition, including investigative and cleanup costs, and an assessment of monetary penalties. The State alleges that approximately 60% of New Hampshire's population relies on groundwater wells for drinking water, and that more than 200 public water supplies and 40,000

private wells in New Hampshire contain some level of MTBE.

The State also filed a declaratory judgment action challenging the individual lawsuits filed by two New Hampshire communities against MTBE makers and refiners to recover the same damages sought by the State. That action is pending and is being reviewed on an expedited basis.

Environmental Enforcement in New Hampshire

New Hampshire's environmental laws govern activities ranging from the proper management and disposal of hazardous waste to the filling of wetlands and the construction of docks. These laws fall into three broad areas: protection of the State's waters; prevention of air pollution; and appropriate management of wastes. Environmental laws typically carry a range of enforcement mechanisms, from administrative remedies to civil penalties, injunctive relief, and



Unpermitted solid waste site in Lempster, New Hampshire, whose clean-up the Environmental Protection Bureau has sought for many years.

criminal penalties. Working closely with the Department of Environmental Services (DES), the Fish and Game Department (F&G), and other client agencies, the Bureau assesses whether an environmental law was violated and takes an appropriate enforcement response.

Environmental Crimes

During the biennium, the Bureau worked with local law enforcement as well as with the Criminal Investigation Division (CID) of the federal Environmental Protection Agency (EPA) in investigating and prosecuting environmental crimes. The Bureau opened seven new criminal investigations, filed charges in one case, and resolved three cases through the entry of guilty pleas. In several cases, the decision was made not to pursue the case criminally; however, some cases ultimately resulted in civil or administrative enforcement.

In 2003, hotel owner Kevin Craffey and renovation crew foreman Jose Fonseca were indicted on eight felony counts each for exposing workers to asbestos and for conspiring to illegally remove and dispose of asbestos waste stripped from boilers, pipes, and other structures at the Mountain View Grand Hotel in Whitefield during its redevelopment in 2001. Mr. Craffey pled guilty to two felony counts, was sentenced to serve two months at the House of Corrections with an additional 22-month sentence deferred for two years upon his release, ordered to pay a \$150,000 forfeiture to the Asbestos Management and Control Fund, ordered to pay \$82,000 of investigative costs, and complete 150 hours of community service in Coos County. Mr. Fonseca pled guilty to one felony, was sentenced to serve three months at the house of corrections with an additional nine-month sentence deferred for two years upon his release,

ordered to pay a \$4,000 fine, and complete 100 hours of community service.

Civil Enforcement of Environmental Laws

During the biennium, the Bureau opened approximately thirty new civil environmental enforcement matters, most of which led or will lead to filing civil actions in Superior Court. One civil enforcement case and three administrative enforcement cases went to trial or evidentiary hearing. The Bureau entered into formal settlements in twenty-five civil enforcement cases, and collected a total of \$1,071,825 in civil penalties.

In settlements, defendants were required to remedy the violations and any resulting harm, in addition to paying monetary penalties. Under appropriate circumstances, the Bureau allowed defendants to conduct Supplemental Environmental Projects (SEP) in lieu of a portion of the civil penalty. In several cases, defendants agreed to undertake environmentally beneficial projects that went beyond correcting the harm they caused.

Waste

The Bureau's waste management enforcement cases were brought under the Hazardous Waste Management Act, RSA chapter 147-A and the Solid Waste Management Act, RSA chapter 149-M, as well as the Oil Discharge or Spillage Act, RSA chapter 146-A and the Underground Storage Facilities Act, RSA chapter 146-C.

Hampshire Chemical paid a \$475,000 penalty for violations of the Hazardous Waste Management Act when its Nashua facility, which manufactures inorganic and organic industrial chemicals, discharged acidic, caustic or corrosive wastewater into an open outdoor holding basin. The

State's suit resulted in a finding that it was illegal to store hazardous wastes, which are subject to "cradle to grave" regulation, in an open holding basin. The State also proved that hazardous liquid leaked from a separate storage tank and was pumped into a storm sewer without immediate notification of hazardous waste release to the State.

The Bureau also handled a number of enforcement actions involving leaking underground storage facilities. Through coordination DES and the State filed two civil actions and eight administrative actions against Peterson Petroleum regarding multiple oil releases from its gas stations. Peterson settled for a \$125,000 civil penalty, with \$50,000 suspended. The Alward case, also involving leaking tanks, was settled for \$60,000, with \$35,000 suspended. In the 125 Quickie case, an injunction barring gas sales was issued with the gas station owner later found in contempt for violating the injunction.

On solid waste issues, the Bureau successfully represented DES in an administrative licensing action resulting in the revocation of the solid waste permit issued to Regenesys Corporation. The DES hearing officer concluded that the company made a false and misleading statement when it certified, in conjunction with a permit transfer application, that none of its officers or directors had been convicted of a felony when an officer had been convicted of felony witness tampering. While the officer in question resigned prior to the permit transfer, the company did not inform appropriate regulators of the conviction, the resignation, or other material information relating to the companies involved with the facility. This case is presently on appeal to the Waste Management Council.

The Bureau also brought or concluded several enforcement actions relating to operation of unpermitted solid waste facilities. These included Poisson which settled for a \$60,000 penalty; Howe which settled for a \$5,000 penalty; and Hong Dong Lee with a court order for \$181,500 in penalties both for the initial violations and for failure to comply with an administrative order.

Water

Many of the Bureau's enforcement cases involve the illegal dredging and filling of wetlands or the construction of unpermitted facilities over or adjacent to State waters, both governed by the Dredge and Fill in Wetlands Act, RSA chapter 482-A. Actions were also brought under the Comprehensive Shoreland Protection Act, RSA 483-B, the Water Pollution and Waste Disposal Act, RSA 485-A, and the Safe Drinking Water Act, RSA 485.

In a case against Epiphany Farms, Inc., and Norris Hariman Construction, Inc, the State proved that the defendants illegally transformed approximately twelve acres of forested wetland on the Epiphany Farms property in Wolfeboro by clearing away all trees and other vegetation from the wetland, stumping the land, constructing a lagoon, and dredging and filling throughout the wetland. Under a Consent Decree, the defendants were required to restore twelve acres of forested wetlands, pay a \$100,000 civil penalty, repay \$200,000 that had been spent on site stabilization, and restore all of the affected wetlands on the Epiphany Farms property at an estimated cost of \$400,000.

The Hampshire Hills Racquet and Health Club in Milford paid a \$75,000 civil penalty for dredging and filling approximately 1.8 acres of wetlands and altering about 15 acres of

terrain without a permit. Another case involved Remi-Sons, Inc., the contractor for the Town of Derry, which dredged and filled over 71,000 square feet of wetlands without a permit during the construction of athletic fields. The company agreed to a total penalty of \$100,000 with \$35,000 cash, \$35,000 suspended for two years contingent on no further violations, and an SEP (restoration and remediation of an unrelated site) valued at \$30,000. Other wetlands settlements included DeLong for \$50,000 cash, Guay for \$30,000 cash plus \$20,000 suspended, Lambert for \$20,000 cash plus \$30,000 suspended, and Lund for \$21,000 cash plus \$27,000 suspended.

Some settlements involved the transfer of lands for the purpose of conservation. In the Baker case, the State proved that the defendants engaged in unpermitted work in approximately 10 acres of wetlands ranging from constructing rip-rap and installing drainage pipes, to filling and dredging without a permit. Defendants agreed to a \$20,000 cash penalty, a \$50,000 suspended penalty, transferred a 17-acre parcel to the Nature Conservancy, and restored the affected wetlands. Similarly, in the Levi Ladd case, also involving the alteration of wetlands, the defendant deeded 17 acres of conservation land in Concord to the State.

Air

The Bureau opened four new enforcement matters based on referrals from the Air Resources Division of DES, and settled one air pollution matter. In its case against Pilgrim Foods, the State proved, among other things, that Pilgrim Foods operated a facility located in Greenville without a Title V Operating Permit or State permit to operate, operated the facility in violation of State

law and agency rules, failed to maintain proper documentation, failed to submit required reports, and failed to pay emission based fees. After demonstrating an inability to pay a substantial penalty, the company agreed to pay a \$10,000 cash penalty and to complete a \$90,000 SEP consisting of an environmental audit and replacement of an existing air compressor.

License Actions

The Bureau represented DES and Fish and Game ("F&G") in three evidentiary hearings involving licenses. The Regenes case, which resulted in revocation of a solid waste permit, is discussed above. In addition, the Bureau handled two hunting license actions on behalf of F&G. The Hardwick case involved an application for a hunting license filed by a man whose license had been revoked ten years previously after he accidentally killed a man while hunting. Following a hearing, the F&G Commission denied the applicant a hunting license, but did allow him to engage in bow hunting. Later, in the Laro case, the Bureau argued for revocation of the lifetime hunting license of a man who had accidentally shot and killed another hunter, but had been acquitted of criminal charges. After a hearing, the Commission voted to revoke the license. In September of 2005, the New Hampshire Supreme Court declined to hear Mr. Laro's appeal of the revocation.

Agency Counsel and Representation

In addition to its enforcement responsibilities, the Bureau also plays a significant role in representing the interests of its client agencies. In situations where client agencies have spent State funds to address environmental or natural resource-related problems, the Bureau pursues

cost recovery against responsible parties. The Bureau recovered a total of \$414,435 in costs. The Bureau also reviewed 1100 agency contracts prior to their submission to Governor and Council. And, the Bureau represents its client agencies in personnel matters and, on occasion, in litigation relating to such matters.

The Bureau reviews and approves property acquisitions, most often for conservation purposes, by client programs including F&G and the Land Conservation and Heritage Investment Program (LCHIP). At times, Bureau attorneys become involved in litigation defending State property interests, as in the Osborne case where the owner of property subject to a conservation easement was unwilling to comply with the terms of the easement.

In the Superfund arena, the State participated in settlements with parties with de minimis responsibility for contaminating the Beede Waste Oil facility in Plaistow with hazardous waste. As part of these settlements, with a combined total of 288 parties, the State received more than \$220,000 toward the costs it has incurred in addressing the site. The process of cleaning up the site and resolving legal liability with the hundreds of remaining parties continues. The Bureau also continues to work with counsel for EPA and the responsible parties in reaching resolution on a number of other Superfund sites within the State.

The Bureau successfully recovered some funds for the State involving rental fees for State-owned hydroelectric dams. The rental agreements provided that payments to the State would be based on the revenue the operators received from power contracts. After PSNH bought out many of the hydroelectric power purchase contracts, the State was left without a major source of

revenue for its dam maintenance program. The State brought suit under the lease agreements and obtained a favorable ruling in the Supreme Court, ultimately settling the cases.

The Bureau defends lawsuits and administrative challenges to the actions of its client agencies, including appeals of environmental permits issued or denied by DES. The Bureau opened approximately 25 new matters representing DES programs in administrative appeals before the Air, Water, Waste and Wetlands Councils, and also continued to represent the agency in previously filed appeals. Several of these matters were appealed.

Most administrative appeals involved challenges to the issuance or denial of permits, sometimes by concerned abutters or citizens' groups, and sometimes by applicants who were not granted the approval they sought. Some of the appeals raised concerns of regulatory significance to DES, such as the interaction between the Shoreland Protection Act, RSA chapter 483-B and other environmental permitting statutes, or the applicability of setback requirements to preexisting septage lagoons.

The Bureau continued to be active in issues surrounding the State's petroleum reimbursement funds for oil discharges and MTBE contamination. The Bureau provides general legal advice to both DES and the Oil Fund Disbursement Board (Board) on issues relating to reimbursement of cleanup costs to eligible owners of petroleum facilities and to public water suppliers with MTBE contamination. The Bureau has represented the Board in settling a number of third party damage claims against petroleum facility owners to which the Board has reimbursement obligations. The Bureau has also advised the Board with regard to funding water main extensions in

several localities where MTBE contamination threatens private water supplies.

The State finalized a covenant not to sue with NEWS, a Cassella-affiliated waste disposal company which will finance capping, closure, and remediation of the Colebrook landfill. The Colebrook Landfill is unlined and is the source of an ongoing hazardous waste release to groundwater which threatens to contaminate Lime Pond, an ecologically significant and unique North Country feature, upon which F&G holds a conservation easement. NEWS may utilize the remaining capacity on the four acre landfill site for which it will pay to Colebrook cash earmarked for the remediation work. The covenant protects NEWS against liability for existing and new contamination but requires that NEWS exercise due care and post nearly \$600,000 in financial assurances to the State to guarantee the groundwater remediation under certain circumstances.

Another significant transactional matter was the Pease Development Authority's acquisition of several large parcels at the former Pease Air Force Base from the federal Department of Defense. Because the property is a Superfund site at which cleanup is ongoing, and because it is the location of a water supply well whose use could impact the cleanup, the acquisition involved a complex negotiation among federal, State, and local entities.

Regional Air Initiatives

The Bureau has played a very active role in regional litigation initiatives to address the unique air pollution problems of the Northeastern states. Prevailing winds carry industrial pollution from the Midwest into New Hampshire, causing serious air quality problems and acid rain that degrades the State's forests,

lakes, and streams, with accompanying impacts on the forestry and tourism economies. Much of this pollution comes from older industrial facilities that lack modern pollution control equipment. Under the federal Clean Air Act, these older facilities may remain in operation, but must install state-of-the-art emission controls when they make modifications that would cause significant air pollution. This requirement is called "New Source Review" (NSR). The State joined in two lawsuits challenging EPA "reforms" to the NSR program alleging they would exempt up to half of major sources from the requirement of installing emission controls when they make facility upgrades. The Bureau succeeded in obtaining a stay of the most significant reform pending a final decision on the merits in federal court.

New Hampshire also took a leading role in challenging EPA's regulations for reducing mercury emissions from power plants. In one suit, New Hampshire and fourteen other states challenged the legal authority EPA relied upon for removing power plants from the list of mercury sources requiring strict, plant-specific standards. A second lawsuit was filed after EPA adopted a cap-and-trade program for power plant emissions of mercury. The states allege that EPA's rules will not reduce mercury emissions from power plants for years to come and do not conform with the Clean Air Act's requirement

that mercury, a potent neurotoxin, be substantially reduced on an expedited basis. Both suits are pending in the United States Court of Appeals for the District of Columbia Circuit.

In related litigation, the Bureau, along with EPA and seven other Northeastern states, continued its active involvement in a citizen suit against an upwind midwestern utility, American Electric Power (AEP), for violation of Clean Air Act requirements and resulting harm to New Hampshire's air quality. The suit alleges that AEP constructed major, life-extending upgrades to eleven of its midwestern coal-fired power plants, and increased emissions that harm the northeastern states without installing state-of-the-art pollution controls as required by the Clean Air Act.

The Bureau also joined in a successful multi-state effort to improve the energy efficiency standards applicable to the manufacturers of air conditioners and heat pumps. In a challenge to a federal Department of Energy effort to roll back efficiency standards for these consumer products, a number of states across the country obtained a federal appellate court order vacating the new standards, which effectively reinstated the more stringent, preexisting efficiency standards. The stricter standards will help improve air quality in New Hampshire by reducing power usage in upwind states.

Bankruptcy Matters

Most bankruptcy matters affecting State interests were handled by an attorney in the Environmental Protection Bureau. In addition to litigating bankruptcy matters, the bankruptcy attorney devoted considerable time to assisting other attorneys and other agencies in "bankruptcy proofing" settlements, consent decrees, and other transactions.

One case involved USGen who succeeded New England Power Company (NEP) as owner of numerous hydroelectric facilities on the Connecticut River and as purchaser of power from other hydro facilities in the State. It filed a Chapter 11 case in Maryland where the State was named as one of the company's 20 largest creditors based on water user contracts and dam fees owed to DES. The State devoted considerable time to the case to ensure that no water user contracts would be affected by the bankruptcy. The Bureau also assisted outside counsel representing the Upper Connecticut River Mitigation and Enhancement Fund which successfully sought to enforce and retain rights under an agreement previously reached in the context of a Federal Energy Regulatory Commission licensing action between NEP and the States of New Hampshire and Vermont, the U.S. Fish and Wildlife Service, the National Park Service, and a number of non-governmental conservation organizations.